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No. 2527

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

JUNG QUEY alias SAM KEE, LI CHEUNG, MON HING and JT YEE,
*Plaintiffs in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF FOR PLAINTIFFS IN ERROR.

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*Filed this.....day of March, 1915.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

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## BRIEF FOR PLAINTIFFS IN ERROR.

The defendants (plaintiffs in error here) were indicted jointly with one Yik Fat, for two alleged conspiracies. The indictment in the first count (Trans. p. 12) purported to charge a conspiracy to "import etc fourteen pounds of opium prepared for smoking purposes"; and the second count thereof (Trans. p. 6) purported to allege a conspiracy to "receive and conceal fourteen pounds of opium prepared for smoking purposes, which they knew had been imported contrary to law".

The defendants were placed upon trial, and on that trial the jury acquitted them all upon the first count, and found the defendant Yik Fat "not

guilty'' upon the second count, and the jury disagreed as to the other defendants upon the second count.

Thereafter the remaining four defendants were again tried, and the jury found them ''guilty'' upon the second count (Trans. p. 22), and as to the special pleas of former acquittal the jury found (Trans. p. 22) in their favor upon their pleas of ''former acquittal'' of the ''offenses charged in the first count''; and ''for each of the defendants upon his plea of former acquittal of conspiracy with Yik Fat''.

When the defendants were first arraigned upon the indictment demurrers were interposed on behalf of each of them to the indictment, and to each count thereof (Trans. pp. 9, 10, 11 and 12). These demurrers were overruled, whereas we contend that the Court erred in overruling these demurrers, and upon this appeal (all defendants having been acquitted upon the first count) we request this Court to review the order of the Court in overruling the demurrers to the second count of the indictment.

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**THE COURT ERRED IN OVERRULING DEMURRER TO SECOND COUNT OF INDICTMENT.**

The second count (Trans. p. 6) purports to allege a conspiracy to ''receive and conceal'' opium after importation, and purports to allege, in furtherance thereof, three overt acts by Li Cheung and Yik Fat

(Trans. pp. 6 and 7, fols. 5 and 6), and one overt act (Trans. p. 8, fol. 6) by Mon Hing and Jt Yee.

The first purported overt act is that Li Cheung and Yik Fat about January 30, 1914, brought seven skins of smoking opium into San Francisco; the second purported overt act is that the two same defendants on the same day "prepared seven skins of opium for the purpose of causing them to be delivered to Jung Quey"; the third purported overt act is that the same two defendants, on the same day, delivered seven skins of opium to one H. Matthai, a quartermaster on the steamer "China", for the purpose of having it delivered to Jung Quey, and the fourth purported overt act is that Mon Hing and Jt Yee, on the next day, received seven skins of opium.

None of the overt acts are alleged to have been "knowingly or fraudulently" done; and the fourth purported overt act is not, and cannot be, in any way connected with the three preceding overt acts as alleged.

No overt act is alleged to have been done by Jung Quey, and therefore we contend that the demurrer interposed by him should have been sustained, because there is no connection made that any overt acts were done with his knowledge in furtherance of any conspiracy, but on the contrary, although it is alleged that certain defendants prepared and delivered opium for the purpose of having the same given to him, there is no allegation that he knew of the conspiracy, or ever received it.

THE SECOND COUNT IS INSUFFICIENT.

The second count is insufficient for several reasons:

First.—Because it alleges no scheme to use any means, nor any agreement to use any means, which is one of the material deficiencies of the first count.

U. S. v. Cassidy, 67 Fed. 698;
U. S. v. Munday, 186 Fed. 375.

Second.—The second count purports to allege a conspiracy to "conceal and receive after importation" and the conspiracy as alleged does not show a conspiracy to do any unlawful act.

Clearly if this count of the indictment was based upon a violation of the act itself, instead of a conspiracy to do the act, it would not allege facts sufficient to constitute a public offense, and when a conspiracy to do an act is charged, it must be a conspiracy to do every act essential to constitute the offense itself, and, if such is not the conspiracy, it is not an unlawful confederation.

The Act of February 9, 1909, as amended January 17, 1914, provides that it shall be unlawful to import opium, etc.; such part of the act is only descriptive as to the kind of opium which cannot be imported, in and of itself it makes no public offense, but Sec. 2 of the Act describes certain acts as constituting public offenses, but in and of itself does not state all the facts essential and necessary to constitute such offense, or its description; that is, resort must be had beyond the terms and lan-

guage of Sec. 2 to ascertain, for example, as to what is meant by "import any opium * * * contrary to law", and what is "contrary to law" is to be determined by the language of the first section of the Act.

Therefore it is not sufficient in this indictment to use the language of the statute, and allege only that certain opium was imported "contrary to law".

Keck v. U. S., 172 U. S. 434.

Furthermore an indictment for "receiving or concealing" should allege at least, in the language of the statute, that the same was received "after importation", and showing the unlawfulness of such importation, and that the defendant "well knew that the opium had been imported contrary to law", and an indictment to conspire to "conceal and receive" opium after importation, without so alleging is fatally defective.

U. S. v. Carll, 105 U. S. 611.

Third.—It would not be unlawful at San Francisco, for two or more persons to conspire to "receive or conceal" opium in Mexico, which had previously been imported into the United States; in other words to give this Court jurisdiction a conspiracy must be alleged to "receive or conceal" opium in this district (or at least within the United States) after its unlawful importation, and no such conspiracy is herein alleged; this count simply alleges a conspiracy "to * * * receive and conceal

seven skins etc.''; when or where they were to be received or concealed is not alleged; therefore no conspiracy against any law of the United States is alleged; were the indictment for doing the forbidden act itself it would have to allege a receipt and concealment within the federal jurisdiction, and the allegations as to overt acts within the jurisdiction cannot aid a defective allegation of the conspiracy itself.

U. S. v. Britton, 108 U. S. p. 199;
U. S. v. Hess, 124 U. S. 484.

Fourth.—The first alleged overt act could not in any way tend to effect the object of a conspiracy to conceal opium ''after importation''.

Fifth.—The second and third alleged overt acts could not tend to effect any unlawful conspiracy to ''conceal or receive'' unless the opium was to be delivered to Jung Quey within this jurisdiction, or at least at some place within the United States.

Sixth.—The fourth alleged overt act could not be in furtherance of any alleged conspiracy, if the facts as to the second and third alleged overt acts are true.

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THE ACT IS UNCONSTITUTIONAL.

We contend that Congress has no power to legislate so as to punish for ''receiving and concealing opium after importation'', and that therefore there can be no conspiracy to do that which Congress has no power or authority to declare unlawful.

The authority of Congress is limited to prohibiting importation, and the state alone can legislate as to the opium after it is actually within its territorial jurisdiction.

Keller v. U. S., 213 U. S. 138.

This question of the right to maintain this prosecution is raised in this record first by the demurrer, and second, by objection to the admission of any evidence in the case (Trans. p. 26).

The record shows the following proceedings then had in that particular:

> "Mr. Cook. At this time I desire to object to any evidence in this case under the indictment on the part of the prosecution on the ground that the offense as charged of the conspiracy to conceal opium after importation is an unconstitutional act and not an offense with the federal jurisdiction.
> The Court. Overruled.
> Mr. Cook. Exception."

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THE COURT ERRED IN EMPANELMENT OF JURY.

When the trial was about to proceed, as shown in the "bill of exceptions", at page 23 of the transcript, objection was made to the jury panel by defendants' counsel, as follows:

> "It then and there duly appeared to the Court that the defendants had been previously placed upon their trial upon the indictment in this cause, and that upon such trial the jury had found all of the defendants 'not guilty' upon the first count of said indictment, and found the defendant, Yick Fat, 'not guilty'

upon the second count of said indictment, and the jury upon said trial were unable to agree upon a verdict as to the defendants Jung Quey, alias Sam Kee, Li Cheung, Jt Yee and Mon Hing, upon the second count of said indictment. And that upon the impanelment of the jury upon said first trial of said cause that four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen were challenged by defendants by peremptory challenges, and that the names of said four talesmen so peremptorily challenged were in the jury-box and likely to be (21) called as prospective jurors upon the second trial of said cause.

That under the aforesaid circumstances and conditions the attorney for the defendants, prior to the clerk drawing any names from the jury-box for the second trial of said cause, requested the Court to order the clerk to withdraw from said box the names of said four talesmen so peremptorily challenged upon the first trial of said cause. Said request was made upon the grounds that necessarily the defendants would be obliged to again peremptorily challenge said four talesmen if called to qualify as jurors upon said second trial, with the result that the defendants would in reality, under the existing conditions, be only allowed six free peremptory challenges as allowed by law. Such request on behalf of defendants was by the Court denied, to which ruling defendants duly excepted.

Thereupon an impanelment of the jury was commenced, and said four names of said talesmen so peremptorily challenged were again among the first twelve talesmen drawn from the box for examination as to qualifications to serve as jurors upon said second trial. That defendants were obliged to and did again exercise peremptory challenges as to three of said talesmen so peremptorily challenged as aforesaid

> upon said first trial, and the fourth of said talesmen was sworn and impaneled as a juror upon said second trial; and before the jury was impaneled and completed, and before said fourth talesman was sworn and impaneled, the ten peremptory challenges allowed to defendant by law had not all been exercised, the defendants had exercised the ten peremptory challenges allowed by law."

The precise question raised has never been determined by any Court so far as our research has gone, but the inevitable result of the action of the Court was to, in fact, reduce the number of peremptory challenges to which the defendants were by law entitled; and even though such diminution only consisted in one challenge it deprived the defendants of a legal and substantial right.

The record and facts disclosed that certain jurors had been challenged by defendants upon the first trial, and the experience of attorneys and judges is that a similar course would have to be pursued, in the matter of exercising peremptory challenges, if the same talesmen are again to be subjected to a test as to their impartiality and fairness, upon a second trial of the same cause.

Experience has shown that talesmen seem to take the exercise of a peremptory challenge as an affront, and a personal bias is then and there impressed upon the mind of such talesman against the attorney whom the talesman believes has impugned his integrity, so that he is an unfair juror to the client.

We submit that the reason assigned in the following cases sustain our contentions that the action of the Court, in thus curtailing the number of defendants' peremptory challenges, was prejudicial to their rights, and reversible error.

People v. Harris, 61 Cal. 136;
People v. O'Neil, 61 Cal. 435;
People v. Zeigler, 135 Cal. 462.

In the Zeigler case a jury had been empaneled, and an accepted juror was excused for illness, and the Court held that, on reforming a jury, the defendant was not restricted only to the remainder of his unused peremptory challenges, but was entitled to his full twenty peremptory challenges allowed by law.

We submit, therefore, that the Court erred in denying the request of defendants' counsel for the Court to direct the clerk to withdraw from the jury-box the names of the four talesmen who had been peremptorily challenged upon the first trial.

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**THE GENERAL VERDICT OF GUILTY IS INCONSISTENT WITH THE SPECIAL VERDICTS OF "FORMER ACQUITTAL" IN FAVOR OF DEFENDANTS.**

The acquittal of all five of the defendants on the first count, and the verdict in favor of the four defendants on trial, of such former acquittal, is a finding that none of the overt acts as therein alleged were done by any of the defendants; and the ac-

quittal of the defendant Yik Fat upon the second count of the indictment, and the verdict of the jury (Trans. p. 22) that all of the defendants had been previously acquitted of any conspiracy, as alleged in the indictment, with the defendant Yik Fat.

Such verdict must necessarily find that none of the three overt acts, as first alleged in the second count, were done by Li Cheung in furtherance of the conspiracy, and also nullifies the fourth overt act alleged; and as the overt acts must be alleged and proved, the verdict of "guilty" is not sustained, and is at variance with the special verdict of former acquittal.

All of the three overt acts are alleged to have been done by Li Cheung and Yik Fat, and as Li Cheung was acquitted of any conspiracy with Yik Fat the special verdict of former acquittal in legal effect acquits Li Cheung and Jung Quey, because no overt act is alleged to have been done by Jung Quey, and the jury by the special verdict of former acquittal thereby, as an inevitable legal consequence, has found that Li Cheung did none of these overt acts in furtherance of the conspiracy; and the special verdict also has the effect of finding that the fourth overt act, in reference to Mon Hing and Jt Yee, was not in furtherance of the conspiracy as alleged.

We contend that the special verdict of former acquittal being inconsistent with, and irreconcil-

able with, the general verdict of "guilty", that such general verdict must fall, and the judgments and sentences pronounced thereon should be reversed.

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**MOTION OF DEFENDANTS TO STRIKE OUT PORTIONS OF TESTIMONY OF WITNESS MATTHAI REGARDING THE FIRST THREE OVERT ACTS SHOULD HAVE BEEN GRANTED.**

The witness Matthai testified (Trans. p. 32) in substance and effect that he had certain conversations with the defendant Li Cheung, and took a letter to the defendant Jung Quey, and brought a letter back from Jung Quey, which he gave to the defendant Yik Fat; all of which testimony was introduced for the purpose of proving those first three overt acts, and in view of the record, as shown at page 25 of the transcript, establishing the former acquittal of all of the defendants in the first count of the indictment, and of the acquittal of Yik Fat in the second count of the indictment, the motion of the defendants to strike out such testimony should have been granted.

The proceedings in relation to such motion are found at the bottom of page 38 of the transcript, and the assignment of such error is found at page 140 in the transcript.

The proceedings at page 38 of the transcript read as follows:

> "Mr. Cook. At this time, I move to strike out, if the Court please, the testimony of this witness with relation to any of the overt acts,

in relation to the first and second overt act alleged in the indictment, on the ground that it is incompetent, irrelevant and immaterial, and on the ground it appears affirmatively in evidence in this case that Yick Fat was acquitted by a jury in this cause of any conspiracy, combination, consideration or agreement as alleged in the second part of the indictment; that all of these defendants were acquitted of the offense charged in the first count of the indictment of conspiracy to import any of this opium into the United States, and that the second count of the indictment of conspiracy to import any of this opium into the United States, and that the second count of the indictment as to the overt act of the testimony of this witness in support thereof for the purpose it was offered by the United States Attorney is in support of the allegation of the overt act in furtherance of the further conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Li Cheung and Yick Fat, on the thirtieth day of January in the year of our Lord one thousand nine hundred and fourteen, on the steamship 'China', then and there lying and being in the port of San Francisco in the State and Northern District of California, prepared seven skins or bladders containing fourteen pounds of opium prepared for smoking purposes which said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors aforesaid, unknown, contrary to law, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; and the second act alleged in pursuance of that conspiracy, that (34) Li Cheung and Yik Fat on the same day, at the same time and place, delivered seven skins or bladders containing fourteen pounds of opium to one H. Matthai, a quartermaster on the steamer 'China'. I submit under the evidence

here there is no conspiracy whatever proved between anyone else than Yik Fat; no conspiracy proven between Sam Kee or Mon Hing at the time that any one of these acts testified to by this witness was concerned, nor as to any fact alleged as to these overt acts. That whatever was done there, was done, if it was done at all, was done in pursuance of a conspiracy solely between Yik Fat and Li Cheung, and the jury have found that no such conspiracy existed by reason of acquitting Yik Fat of conspiracy.

The motion was by the Court denied, and defendants duly excepted."

We contend that, by reason of the acquittal of Yik Fat, in relation to these overt acts, that the defendant Li Cheung and Jung Quey were also acquitted thereby, and that all of the evidence of this witness in relation to said overt acts, was therefore irrelevant, incompetent and immaterial, that the motion to strike out should have been granted.

The citation of any decisions to sustain this position are unnecessary, and in fact impossible, because the question involved must be determined solely upon the record of this case itself.

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ERRORS OF COURT IN ADMISSION OF CERTAIN TESTIMONY.

The witness named A. V. Kirchisen was called as a witness on behalf of plaintiff (Trans. p. 61) testified that he was a quartermaster on the steamer "China" and had been such for about 18 months, and that he knew the defendant Li Cheung, and

against the objection of the defendants' counsel, the following questions were asked and answered by said witness:

"I had a conversation with him about opium in October and November, 1913.

Q. Where was it?

(Objected to by defendants upon the ground that it is incompetent, irrelevant and immaterial, and prior to any date alleged here, and prior to the importation of any opium as to the conspiracy which is charged. Objection was overruled, and defendants duly excepted.)

A. In the storekeeper's room, here in San Francisco, on the trip before.

(Mr. Cook. The same objection goes to all this line of testimony, which is objected to under the ruling of the Court.)

Q. Well, the trip on which she came in in January, did you have any conversation with him about opium before you came to San Francisco?

A. Yes, sir, between Yokohama and Honolulu.

Q. Had you or not made known to the customs' officers any fact in connection with Li Cheung before you arrived on this last trip?

(Defendants objected to the question upon the ground that it was hearsay; the objection was overruled and defendants duly excepted.)

A. Yes, sir.

Q. About how many conversations did you have, if you had more than one on the trip from Hongkong to San Francisco?

A. About half a dozen times.

Q. What was the tenor or substance of these conversations?

(Mr. Cook. The same objection.)

A. Taking opium ashore for him. He told me he had plenty of opium on board."

Error in this kind of interrogatory is specified as the seventh additional assignment of error, at page 143 of the transcript.

All of this testimony was clearly irrelevant, incompetent and immaterial matter, as it related to a different transaction, and in no way connected with the conspiracy, which is alleged to have been formed on January 29, 1914, to "receive and conceal opium" after importation. It was in direct violation of a settled rule of law as to other or different offenses, or conversations in relation thereto, are inadmissible, and the clear and unmistakable purpose of the district attorney in getting such testimony was to prejudice the minds of the jury, and the admission thereof was clearly prejudicial to all of the defendants in the case, and the objections to the admission of such testimony should have been sustained.

A witness named D. F. Belden was called as a witness on behalf of the defendants (Trans. p. 64), and he testified that he was in the real estate business, and had known the defendant Jung Quey for six or seven years, and knew his general reputation to be good. On cross-examination, against the objections of the defendant, the district attorney was permitted to ask the following questions:

> "Q. I will ask you if it is not a fact that he was in the opium business in Nevada?
>
> (Mr. Cook. Objected to and I assign it as a prejudicial error on the part of the district attorney.)

A. I never heard of it, I never heard of his connections with opium at all.

Q. Is it not a part of his reputation that opium has been found in his room time and time again?

(Mr. Cook. The same objection.)

A. Never.

Q. Is it not a part of his general reputation that he has sent for customs inspectors and other people, and tried to enter into unlawful combination with them for the purpose of getting opium?

A. I never heard of it. I have known of his reputation from his associations from his connections with my father-in-law in Nevada, in the railroad business furnishing contract labor. My father is general superintendent of the Southern Pacific Railroad and I believe Jung Quey furnishes Chinese labor to the railroad. I never heard anything against his reputation."

The permission of such cross-examination is specified as error, in the Eighth Additional Specifications of Error, at page 144 in the transcript.

Such conduct on the part of the district attorney was reprehensible, and questions were asked for the purpose of prejudicing the jury against the defendants, and the Court, in permitting such conduct by the district attorney, clearly permitted testimony, in the form of inferential questions, imputing the reputation of the defendant Jung Quey, to be asked, and we urge this matter as a reversible error.

A witness named Thomas R. Harrison, who was called as a witness for plaintiff (Trans. p. 69) testi-

fied that he was an inspector of customs, and against the objection of defendants, was permitted to be asked and answer the following questions:

> "Q. Have you ever had any talk with either of these quartermasters, Matthia or Kirchisen prior to the incoming of the steamer 'China' in January of this year?
>
> (Defendants objected to the question as incompetent, irrelevant and immaterial and that any conversation that this man may have had with the quartermasters on any trip previous would be hearsay. Objection overruled and defendants duly excepted.)
>
> A. Yes, sir. The first information I had was on the trip previous, the trip the opium was landed; that is previous to January 26th of this year."

The foregoing testimony was clearly hearsay, and was irrelevant, incompetent and immaterial, and was elicited solely for the purpose of endeavoring to show a different transaction than the conspiracy as alleged in the indictment, and was for such reasons inadmissible, and the effect of permitting such testimony was clearly prejudicial to the rights of the defendants.

The specification of the foregoing as error is found as the ninth at page 144 of the transcript, in the additional assignments of error.

The Court erred in admitting the evidence, over the objection of defendants, Government's Exhibit No. 3 (Trans. p. 53), which exhibit read as follows:

> "To Yik Fat: Your letter has been received. From Jung Quey."

The Court erred in admitting such exhibit, against defendants' objection, upon the ground that the same was irrelevant, incompetent and immaterial, and the proper foundation not laid. The exhibit was a purported translation of the paper which the witness Matthai testified that he received from the defendant Jung Quey, and which he delivered to Yick Fat, and there is no evidence that he ever delivered it to Li Cheung; and the witness Matthai testified that he delivered the said paper, after he received it, to the witness Head, and the witness Head testified that he had it translated, and the translation was made. And that after the translation was made that he delivered it to the witness Matthai, and the witness Matthai testified that he delivered it to Ah Fat (not a defendant in the case) and he told Ah Fat to deliver it to the defendant Yik Fat.

Therefore there was no proper connection or proof of the delivery of this paper as any part of the conspiracy, to any one of the defendants in the case, and no foundation laid for its introduction, and as the defendant Yik Fat had been acquitted, the delivery thereof to him could not be used, and should not have been permitted against any of the defendants; and for these reasons the Court erred in the admission of such exhibit, and the specification of such error is designated as the tenth of the original assignments of error at page 135 of the transcript.

ERRORS IN REFUSING THE INSTRUCTIONS OF DEFENDANTS.

The Court erred in refusing to give the jury the following instructions requested by the defendants:

> "I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the steamship 'China' on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment."

The testimony of the witness of the Government shows that, any opium testified to, was taken from the steamer with the permission of the Government, and therefore there could not have been any unlawful conduct on the part of any one in relation thereto.

Such license and permission of the Government's officers clearly made any transportation or receipt of any such opium lawful, and no person could be held responsible for receiving such opium as an unlawful act.

The officers of the Government are not permitted to voluntarily place unlawfully imported opium in the possession of the person, and then charge them with the unlawful possession thereof and therefore the jury should be instructed to that effect, and the Court erred in refusing such instructions; and the assignment of such error is found at page 137 of the transcript.

The Court erred in refusing to give the following instructions requested by defendants:

> "A conspiracy has these elements, first, an object to be accomplished, which must be the commission of a public offense against the United States, and not against the laws of any particular state; second, a plan or scheme embodying means to accomplish the object; third, an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme or by effectual means, and fourth, an overt act by one or more of the conspirators in furtherance of and to effect the object of the conspiracy."

This instruction is in accord with our contention that the Court erred in overruling the demurrers to the indictment, by reason of the failure of the indictment to allege all of the necessary elements of the conspiracy, and we rely upon the citations made in support of the demurrer as sustaining our position that error was committed by the Court in refusing this instruction. We contend that it was necessary for the indictment to allege the plan or

scheme by embodying the means to attain the object, and that the overt acts must be such as to accomplish the object by the means embodied in the original scheme of the conspiracy.

U. S. v. Munday, 186 Fed. R. 375.

The Court erred in denying the defendants' motion for a new trial.

Among the grounds urged in the motions for a new trial were that the evidence was insufficient to sustain the verdict (Trans. p. 117).

In this behalf the evidence shows that certain skins or bladders, testified to by witnesses for the prosecution as having contained opium, were produced before, and shown to the jury; that a number of such skins were testified to as having been seven at one time, but that only five skins were recovered by the arresting officers; and the district attorney never offered any of said skins in evidence, for the apparent reason that proper foundation therefor was never laid.

We contend therefore that all of the evidence in relation thereto was irrelevant, incompetent and immaterial, because without the admission in evidence of the things themselves there was nothing in the record in the case which justified the jury in applying the evidence of the various witnesses to such five or seven skins of opium.

If such testimony in relation to such skins is eliminated in this case all of the evidence in re-

lation to any overt acts, in so far as the same relate to smoking opium, is wanting.

The original purpose evidently with the prosecution in the case was to endeavor to show that those particular five skins were the physical subject of the conspiracy itself, and we contend, that having neglected, or failed, to have offered, or introduced such physical exhibits in evidence, left the case with the failure of proof, and that therefore there was insufficient evidence to sustain the verdict, and that the judgment thereof should be reversed.

We submit, and earnestly contend, that for such reasons as hereinbefore stated that the judgment as against all of the defendants in this case should be reversed.

Dated, San Francisco,
March 6, 1915.

Wm. Hoff Cook,
J. C. Campbell,
*Attorneys for Plaintiffs in Error.*